STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALMON OLGETREE,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 240339
Wayne Circuit Court
LC No. 01-002130-01

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to twenty to forty years' imprisonment for the murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case involves what appears to be a drug deal gone bad. On July 2, 2000, defendant and his acquaintance, Eric Skinner, arranged to meet the victim to buy marijuana. At some point during the meeting, Skinner and the victim began to argue over the price, and when it appeared that the victim was going to pull out a gun, defendant and Skinner fled. While in flight, defendant pulled out a gun and shot at the victim, killing him.

Defendant was arrested for the shooting on January 16, 2001. After his arrest, defendant made several statements to the police. Before trial, defendant moved to suppress his custodial statements. The trial court denied the motion to suppress, finding that defendant voluntarily made the statements and voluntarily waived his right to an attorney.

Defendant first made a statement to Officer Gerald Packard. Before making the statement, defendant was read his constitutional rights and he signed a constitutional rights form. In this statement, defendant denied any involvement in the shooting and claimed that he did not

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[1] The convictions defendant presently appeals are the result of a second jury trial. Defendant's first trial ended with a hung jury on the first-degree felony murder count and the felony-firearm count. However, at that trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and sentenced to twenty-three months to five years' imprisonment.

know the victim. Defendant's second statement occurred at approximately 4:00 a.m. on January 17, 2001, and was made to Officer Barbara Simon. Before making this written statement, defendant was again read his constitutional rights and defendant signed the constitutional rights form. In this statement, defendant admitted some involvement in the drug deal, but claimed that Skinner was the one who shot the victim. Defendant made a third statement to Officer Derryck Thomas at approximately 2:20 p.m. on January 17, 2001, and in this statement, defendant admitted that he shot the victim.

In this last statement, defendant admitted that on the day of the shooting, he got a telephone call from Skinner, who asked where he could purchase a large quantity of marijuana. Defendant arranged a meeting for later that day between himself, Skinner and the victim. That evening, he and Skinner met with the victim and Skinner got into the victim's car to make the purchase. When the two began arguing about price, Skinner got out of the car and the victim acted as though he was grabbing for a gun. Defendant and Skinner began running and defendant pulled a gun out of his pocket and fired a shot at the victim. The victim then pulled off down the street and ran his car into a tree. Defendant and Skinner got back into Skinner's car and drove over to the victim's car. They pulled the victim out of the car and dragged him to the grass and then left.

After defendant's arrest and sometime between defendant's statements, at approximately 3:30 a.m. on January 17, 2001, defendant's sister contacted Shirley Titus, a licensed attorney, to represent defendant. Titus claimed that she attempted to contact the Task Force Office several times to speak with officers regarding defendant's case, but could not get through to anyone. She then called the front desk at the First Precinct and spoke to an officer who could not locate any information about defendant. After several more failed attempts at calling the Task Force Office, at about 6:00 a.m., Titus spoke with someone who informed her that the officers she was looking for had left for the day, but that she should try calling back after 7:00 a.m. Titus called back at 7:30 a.m., and spoke with someone from the Violent Crimes Task Force who told her that defendant's case had been turned over to Officer Thomas and that she could go down to the precinct and speak with him at 8:00 a.m. When Titus arrived at the precinct, she met with an officer who went over defendant's file with her and told her that defendant would be arraigned either that day or the next day. Titus then met with defendant for about twenty to thirty minutes.

Defendant now argues on appeal that the trial court erred in denying his motion to suppress his two custodial statements because the police did not inform him that an attorney was attempting to get in contact with him, and thus, he was denied his right to counsel. This Court reviews de novo the trial court's decision to deny a motion to suppress. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). However, this Court reviews the trial court's underlying factual findings for clear error. *Id.* This Court may find clear error if it has "a definite and firm conviction that the trial court made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

Relying on *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), defendant contends that his waiver of his right to counsel was invalid because the police did not inform him that an attorney had been retained to represent him. In *Bender*, *supra*, our Supreme Court adopted a per se rule that a suspect's waiver of his rights to remain silent and to counsel is invalid when "the police fail to inform [the suspect], before he gives a statement, that a specific, retained attorney is immediately available to consult with him." *Id.* at 597. However, *Bender* is readily

distinguishable from the instant case. Unlike in *Bender*, there is no indication in the present case that either Officer Simon or Officer Thomas was aware at the time they took defendant's respective statements that counsel had been retained to represent defendant, or that counsel had attempted to contact defendant before defendant made the statements. In fact, when defendant first made statements, Titus had not even spoken to anyone at the police precinct. Further, unlike in *Bender*, where the officers deliberately frustrated counsel's efforts to get in contact with the defendant, Titus' own testimony reveals that the officers she spoke with were cooperative and allowed her to see defendant almost immediately after she arrived at the police station. Furthermore, both officers Simon and Thomas testified, without dispute from defendant, that defendant never requested a lawyer. While Titus' testimony suggests that she met with defendant before he gave his last statement to Officer Thomas, it is undisputed that before the statement was made, Thomas read defendant his constitutional rights, and there is nothing in the record to indicate that defendant requested an attorney.

The trial court determined that defendant had been informed of his constitutional rights on several occasions, that defendant had indicated that he understood those rights, and that defendant voluntarily waived his rights. Defendant has failed to provide any basis for disturbing the trial court's determination that defendant did not invoke his right to counsel. Further, there is no indication that the police failed in their duty to inform defendant that an attorney attempted to contact him before he made any statements. Therefore, the trial court did not err in denying defendant's motion to suppress the custodial statements.

Defendant also argues on appeal that he was denied a fair and impartial trial. Defendant contends that during trial, in sustaining a prosecution objection, the trial court improperly and intentionally made reference to, and compared defendant's situation to, Osama bin Laden and the September 11th attacks. This statement, according to defendant, impaired the balance of judicial impartiality and prejudiced the jury. Because defendant failed to object to the trial court's remarks below, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). A defendant's substantial rights are affected if the error affects the outcome of the proceedings. *Carines*, *supra* at 761-762. When reviewing whether the trial court's comments deprived defendant of a fair and impartial trial, this Court reviews the comments in their entire context to determine if they were likely to unduly influence the jury. *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995).

A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A trial court has wide discretion and authority in the manner of trial conduct. *Paquette*, *supra* at 340. This discretion, however, is not unlimited, and a trial court "pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* at 350.

The record indicates that during defense counsel's direct examination of defendant's sister, the prosecutor objected after defense counsel asked the witness how often she had seen her brother before January 16, 2001, the date of his arrest. The prosecutor argued that the witness was testifying as an alibi witness, and thus, whether she saw defendant months after the date of the shooting was irrelevant. The court then asked defense counsel to explain the relevance of the date of the arrest, to which defense counsel responded:

> The arrest, Judge, this is to show that he has a pattern of not hiding or flight or trying to run away from this particular situation, that he carried on his normal –

Interrupting defense counsel, the trial court then made the following comment:

> The fact that Osama bin Laden hasn't been arrested doesn't have any relevance to whether he had anything to do with September 11th.

The court went on to state that it did not believe it was relevant whether, or how often, the witness had seen defendant in October 2000, because it was three months after the shooting. In addition, the prosecution clarified that it was not claiming that defendant fled, but rather, that defendant did not know that he would be discovered. The court then sustained the prosecution's objection to the witness testifying to anything that occurred after the date of the incident.

After reviewing the above exchange in the context of the whole record, we find that the trial court's reference to Osama bin Laden and the September 11th attacks, while inappropriate, was not likely to unduly influence the jury to the detriment of defendant. Viewing the court's comment in context, we conclude that the court did not, as defendant contends, make the comment to intentionally arouse prejudice in the jury. Rather, the court used the Osama bin Laden analogy to stress that the fact that defendant was not arrested until January 2001 was irrelevant to the determination of whether defendant was involved in the shooting incident that occurred in July 2000. The court did not comment on defendant's guilt, but instead, made a relevancy determination. Although we agree with defendant that there were other methods or analogies the trial court could have used to communicate its discontent with defense counsel's line of questioning, we find that the trial court's comment, when reviewed in context, concerned an evidentiary issue and did not implicate defendant's guilt. Thus, the comment did not unduly influence the jury. Accordingly, the trial court's comments did not deprive defendant of a fair and impartial trial.

Finally, defendant argues on appeal that the trial court erred in denying his request for a voluntary manslaughter instruction. Specifically, defendant contends that his statement alone was sufficient evidence to support such an instruction because the jury could have reasonably inferred that defendant killed the victim in the heat of passion. Generally, this Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense. *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). In *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), our Supreme Court held that manslaughter is a necessarily included lesser offense of murder because the elements of manslaughter are included in the offense of murder. *Mendoza*, *supra* at 540. The Court explained that, "both murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result," and that malice – the only element distinguishing murder from manslaughter – is "negated by the presence of provocation and heat of passion" which must be shown to establish voluntary manslaughter. *Id.* Having clarified that manslaughter is a necessarily lesser

included offense of murder, the *Mendoza* Court, applying its holding in *Cornell*, *supra* at 357, made it clear that "when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Mendoza*, *supra* at 542.

Contrary to defendant's contention, however, we find that a rational view of the evidence in the instant case does not support an instruction on voluntary manslaughter based on an adequate provocation theory. To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *Mendoza*, *supra* at 535-536; see also *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). For the passion to be adequate, it must be that which would cause a reasonable person to lose control. *Pouncey*, *supra* at 389.

In his custodial statement, defendant did not claim that he fired his weapon as a result of passion, but rather, he claimed that he pulled out his gun and fired as he was running away from the victim's car because the victim "acted like" he was reaching for a gun. Further, defendant stated that he only fired once in the direction of the victim's car so that he could get away, indicating that he did not have the intent to actually shoot anyone. Thus, if the jury believed defendant's version of what happened that night, a conviction for voluntary manslaughter would not have been supported by a rational view of the evidence because not only did defendant lack the requisite intent, there was also no adequate provocation for the shooting. Defendant's version of the events does not indicate circumstances that would have caused a reasonable person to lose control. Thus, defendant was not entitled to a voluntary manslaughter instruction, and the court did not err in refusing to give such an instruction.

Defendant also claims that the trial court erred in failing to honor the court's ruling in defendant's first trial that an instruction regarding involuntary manslaughter should be given. Defendant argues that based on the law of the case doctrine, the trial court was required to give the instruction. We find the law of the case doctrine inapplicable in this case. Further, there is no indication in the record that defendant requested an involuntary manslaughter instruction during the trial at issue. Defendant essentially argues that this trial court should have sua sponte given an involuntary manslaughter instruction merely because such an instruction was given at the first trial. However, defendant's second trial was a completely separate proceeding from his first trial, and a trial court is not required to instruct the jury on lesser-included offenses, such as involuntary manslaughter, unless requested. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Not only did defendant fail to request an involuntary manslaughter instruction or challenge the instructions as given, he also expressed satisfaction with they jury's instructions, thereby waiving the issue on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Affirmed.

/s/ William C. Whitbeck
/s/ Hilda R. Gage
/s/ Brian K. Zahra